Supreme Court, U.S.
FILED

97 - 6 JUN 25 1997

OFFICE OF THE CLERK

DOCKET NO. _____
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ERVIN THOMAS JENKINS, JR.
PETITIONER

VS.

COMMONWEALTH OF KENTUCKY
RESPONDENT

AND
HON. STEPHEN BLAND, SUCCESSOR
JUDGE TO HON. WILLIAM COOPER,
HARDIN CIRCUIT COURT
RESPONDENT

AND
HON. JEFFREY L. ENGLAND
COMMONWEALTH ATTORNEY
RESPONDENT

AND
BARBARA A. JENKINS
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

* * * * * * * * *

PETITION FOR WRIT OF CERTIORARI

* * * * * * * * *

DAVID MURRELL,
COUNSEL OF RECORD
FOR PETITIONER
MEMBER, SUPREME COURT
BAR
3006 FURMAN BLVD.
LOUISVILLE, KY 40220
(502)452-6625

THOMAS S. COOPER
215 NORTH MULBERRY
ELIZABETHTOWN, KY
(502)769-1410

48 pp

QUESTION PRESENTED FOR REVIEW

Whether Petitioner/Defendant who has been placed once in jeopardy and who has then been provoked into moving for a mistrial after the prosecutor asked the Commonwealth's first witness a question designed to evoke a comment on Petitioner's Fifth Amendment right to remain silent is entitled to a plenary hearing on the issue of bad faith and the deliberate nature of the prosecutorial misconduct in a subsequent original action seeking to prevent his retrial in violation of his Fifth and Fourteenth Amendment right to be free from double jeopardy.

TABLE OF CONTENTS

	PAGE
CITATION OF OPINIONS AND ORDERS	1,2
STATEMENT OF JURISDICTION	2,3
ORDERS FORMING BASIS FOR REVIEW	2,3
STATUTE CONFERRING JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN CASE	3-5
STATEMENT OF THE CASE	6-12
REASONS RELIED UPON FOR ALLOWANCE OF WRIT	12-16
MEMORANDUM OPINION OF KENTUCKY SUPREME COURT RENDERED 8-29-96	APPENDIX A
ORDER OF KENTUCKY SUPREME COURT ENTERED 3-27-97 DENYING PETITION FOR REHEARING	APPENDIX B
ORDER OF KENTUCKY COURT OF APPEALS ENTERED 2-14-96 DENYING WRIT OF PROHIBITION	APPENDIX C
ORDER OF HARDIN CIRCUIT COURT ENTERED 9-11-95 GRANTING MISTRIAL	APPENDIX D
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ENTERED BY HARDIN CIRCUIT COURT ON 12-28-95	APPENDIX E
ORDER SETTING RETRIAL ENTERED 10-17-95	APPENDIX F

TABLE OF AUTHORITIES

	PAGE
CASES	
OREGON VS. KENNEDY, 456 U.S. 667, 102 S.Ct. 2083. 72 L.Ed.2d. 416 (1982)	12,14,15
UNITED STATES VS. DINITZ, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d. 267 (1976)	12,15
CONSTITUTIONAL PROVISIONS	
U.S. Const. Amend 5	3,7,9
U.S. Const. Amend 14, Section 1	4,5,7,9
STATUTES	
28 U.S.C. 1257(a)	3
RULES	
KENTUCKY RULE OF CIVIL PROCEDURE, CR 76.36(5)	5,9,12,13

CITATION OF OPINIONS AND ORDERS

1. Kentucky Supreme Court Order in case no. 96-SC-235-MR denying Petition for Rehearing entered March 27, 1997. (SEE APPENDIX B)

2. Kentucky Supreme Court, case no. 96-SC-235-MR Memorandum Opinion of the court affirming rendered August 29, 1996. (SEE APPENDIX A)

3. Kentucky Court of Appeals Order in case no. 95-CA-3479-OA entered February 14, 1996, (denying writ of prohibition). (SEE APPENDIX C)

4. Hardin Circuit Court, case no. 95-CR-00018 Findings of Fact, Conclusions of Law and Order entered December 28, 1995, (denying Petitioner/Defendant's motion to

dismiss indictment on double jeopardy grounds). (SEE APPENDIX E)

5. Hardin Circuit Court, case no. 95-CR-00018 Order entered September 11, 1995 granting Petitioner/Defendant's motion for a mistrial. (SEE APPENDIX D)

6. Hardin Circuit Court, case no. 95-CR-00018 Order entered October 17, 1997 setting a new trial date following the September 11, 1995 declaration of a mistrial. (SEE APPENDIX F)

STATEMENT OF JURISDICTION

ORDERS FORMING BASIS FOR REVIEW

1. The order sought to be reviewed is the Memorandum Opinion of the Kentucky Supreme Court in action no. 96-SC-235-MR rendered on August 29, 1996 affirming the

dismissal by the Kentucky Court of Appeals in action no. 95-CA-3479-OA of Petitioner/Defendant's original action filed in the nature of a writ of prohibition.

2. The Kentucky Supreme Court entered its Order Denying Petition for Rehearing in action no. 96 SC 235-MR on March 27, 1997.

STATUTE CONFERRING JURISDICTION

The Petitioner believes that 28 U.S.C. 1257(a) confers jurisdiction upon this court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN CASE

1. U.S. Const. Amend. 5: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a

presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

2. U.S. Const. Amend. 14, Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

3. Kentucky Rule of Civil Procedure 76.36(5); Original Proceedings in Appellate Court; CR 76.36(5): Evidence in support of or against the petition, other than that which may be attached to the petition and response in the form of exhibits, affidavits, and counter-affidavits, will be permitted only by order of the court, and it shall be in the form of affidavits or depositions taken in accordance with the Rules applicable to proceedings in trial courts. Oral testimony will not be heard in the appellate court.

STATEMENT OF THE CASE

In February of 1995 Petitioner was indicted in the Hardin Circuit Court on ten counts of rape in the first degree and five counts of sodomy in the first degree. Petitioner's wife was indicted on related charges in a separate indictment. The cases were joined for trial. The cases were called for jury trial on September 11, 1995. After the jury was sworn the Commonwealth called Kentucky State Police Detective Carr as its first witness. The Commonwealth asked Detective Carr if he had taken or attempted to take a statement from either one of the Defendants.

Petitioner objected on the ground that to permit an answer would allow an impermissible comment on the Petitioner's Fifth Amendment privilege against self incrimination. Without waiting for a ruling, Detective Carr responded that he

had attempted to take statements from both Petitioner and his co-defendant, but that they declined to give him a statement. The prosecutor advised the court that his question had not been deliberate. The court replied that the question sounded deliberate to him. A conference was held and the court granted Petitioner's motion for a mistrial. (SEE APPENDIX D)

The Commonwealth moved to set the case for retrial. On September 27, 1995 Petitioner filed a written motion in the Hardin Circuit Court to dismiss the indictment on the ground that retrial would constitute a violation of his Fifth and Fourteenth Amendment rights not to be twice tried for the same crime under the United States Constitution. On October 17, 1995 the Hardin Circuit Court set Petitioner's case for retrial for January 11, 1996. (SEE APPENDIX F)

The Hardin Circuit Court referenced Petitioner's motion to dismiss in its Findings of Fact, Conclusions of Law and Order entered December 28, 1995. The Hardin Circuit Court states:

> They now move to dismiss the indictments on grounds that to retry them would violate their constitutional rights against double jeopardy.

The Hardin Circuit Court goes on to find that

> the purpose of the prosecutor's question was not to elicit a comment on the defendants' rights to remain silent. The prosecutor knew Carr had not interviewed the defendants, but that they had been interviewed by employees of the Cabinet for Human Resources. Thus he expected the answer to be No.

The Hardin Circuit Court denied the Petitioner's motion to dismiss. (SEE APPENDIX E)

Being dissatisfied with the ruling of the Hardin Circuit Court, Petitioner filed an original action in the nature of a writ

of prohibition pursuant to Kentucky Rule of Civil Procedure 76.36 in the Kentucky Court of Appeals seeking to prevent his retrial on this indictment. Again Petitioner alleged that retrial would violate his Fifth and Fourteenth Amendment rights not to be twice tried for the same offense. Petitioner argued in paragraph six of his petition to the court of appeals that the trial court had remarked that the Commonwealth's question sounded like a deliberate question in violation of the constitutional privilege against self incrimination. Petitioner also argued that the mistrial would not have occurred but for the deliberate actions of the Commonwealth in asking a question which called for an impermissible and prejudicial response regarding the Petitioner's Fifth amendment privilege to remain silent. The Commonwealth did not file any answer to

Petitioner's original action petition.

The Kentucky Court of Appeals, by order entered in action no. 95-CA-3479-OA, acknowledges that

> The petitioner seeks a writ of prohibition to prevent being tried a second time after a mistrial was granted by the circuit judge.

The Court of Appeals denied the writ of prohibition stating that:

> the circuit court did not make any finding that there was bad faith on the part of the prosecution and therefore... orders that this writ of prohibition be, and it is hereby, denied. (SEE APPENDIX C)

Petitioner appealed the denial of the writ of prohibition to the Kentucky Supreme Court. The Kentucky Supreme court rendered its opinion in action no. 96-SC-235-MR affirming the Kentucky Court of Appeals on August 29, 1996 and denied Petitioner's petition for rehearing on March 27, 1997. At page three of the court's August 29,

1996 memorandum opinion the court notes:

> Appellant argues that retrial of this matter would violate his state and federal guarantees against double jeopardy.

The Supreme Court stated its belief that:

> a retrial does not expose a defendant to double jeopardy unless the trial judge abused his discretion by declaring a mistrial when there was no manifest necessity to do so.

The Supreme Court did not find any error or abuse of discretion by the trial court in the application of this standard. (SEE APPENDIX A)

On Petition for rehearing to the Kentucky Supreme Court Petitioner argued that the Supreme Court erred to Petitioner's substantial prejudice when it affirmed the court of appeals decision without remanding the case back to the court of appeals for a hearing on the issue of bad faith in accordance with the procedures set forth in Kentucky Rule of

Civil Procedure 76.36 and in Oregon vs. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d. 416 (1982). The court did not grant rehearing. (SEE APPENDIX B)

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

The Kentucky Supreme Court, failed to follow the substantive and procedural guidelines adopted by this court in United States vs. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d. 267 (1976) and Oregon vs. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d. 416 (1982) for determination of whether the actions of the Commonwealth should bar retrial of petitioner on double jeopardy grounds.

The Kentucky Supreme Court seems to both misunderstand the test to be applied and its role in review of alleged

prosecutorial misconduct.

The Kentucky state Supreme Court appears to rely on the following standard in determining whether the retrial of the Petitioner should be barred based upon the actions of the prosecutor.

> A retrial does not expose a defendant to double jeopardy unless the trial judge abused his discretion by declaring a mistrial when there was no manifest necessity to do so. (SEE APPENDIX A)

The Kentucky Supreme Court also had no difficulty with the fact that the Kentucky Court of Appeals did not engage in an independent fact finding process under CR 76.36. Instead, the Supreme Court applied an appellate standard of review to the actions of the Hardin Circuit court finding that the trial court had not abused its discretion when it failed to find bad faith. (SEE APPENDIX A)

The Kentucky Supreme Court seems to

intertwine the manifest necessity test with a requirement that Petitioner must show the bad faith of the prosecutor.

However, this court made it clear in Kennedy, supra. that the manifest necessity test does not apply in cases of alleged prosecutorial bad faith leading to a mistrial. The Kentucky Supreme Court does not seem to fully understand this court's directive that allegations of prosecutorial misconduct resulting in a mistrial require an independent factual hearing on the issue of bad faith.

As this court stated in Kennedy, supra.:

> IT MERELY CALLS FOR THE COURT TO MAKE A FINDING OF FACT. INFERRING THE EXISTENCE OR NONEXISTENCE OF INTENT FROM OBJECTIVE FACTS AND CIRCUMSTANCES IS A FAMILIAR PROCESS IN OUR CRIMINAL JUSTICE SYSTEM.

The hallmark of any fact finding process is a neutral and detached tribunal.

In situations such as that presented here, Kentucky has available the mechanism of an original action in the court of appeals which includes a permissive opportunity to present additional affidavits and depositions to aid the fact finding process. Such a mechanism should be utilized to zealously protect fundamental constitutional rights relating to double jeopardy. The Kentucky Supreme Court disregarded the dictates of Kennedy, supra. When it failed to require the Kentucky Court of Appeals to engage in that fact finding process.

Were this court to allow such a state practice to stand, it would condone a practice which would erode its decision in Dinitz, supra and Kennedy, supra. that an objective fact finding process be conducted on the issue of prosecutorial intent and misconduct.

This court should not sanction a state practice which deprives Petitioner of an independent forum and opportunity to address factual issues regarding alleged prosecutorial misconduct which goaded him into requesting a mistrial.

RESPECTFULLY SUBMITTED

DAVID MURRELL
COUNSEL OF RECORD FOR
PETITIONER
3006 FURMAN BLVD.
LOUISVILLE, KY. 40220
(502)452-6625

THOMAS S. COOPER
215 N. MULBERRY ST.
ELIZABETHTOWN, KY.42701
(502)769-1410

APPENDIX A

MEMORANDUM OPINION OF THE SUPREME COURT OF KENTUCKY RENDERED AUGUST 29, 1996

RENDERED: August 29, 1996
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY
96-SC-235-MR

ERVIN THOMAS JENKINS, JR APPELLANT

ORIGINAL ACTION FROM COURT OF APPEALS
V. 95-CA-3479-OA
HARDIN CIRCUIT COURT
95-CR-18

WILLIAM S. COOPER, JUDGE APPELLEE/
HARDIN CIRCUIT COURT
REAL PARTY IN INTEREST

AND

JEFFREY L. ENGLAND,
COMMONWEALTH ATTORNEY
REAL PARTY IN INTEREST

AND

BARBARA JENKINS REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Ervin Thomas Jenkins, Jr., was indicted for first-degree rape and first-degree sodomy. He appeals to this Court as a matter of right, seeking a writ of prohibition to prevent him from being

tried a second time after a mistrial was granted in Appellant's first trial in Hardin Circuit Court. We affirm the Court of Appeals' decision denying the writ of prohibition.

At issue is the conduct of the prosecution on the opening day of Appellant's September 11, 1995 trial. Appellant's wife, Barbara Jenkins, was also charged in the crimes, involving her daughter by a prior marriage; the two indictments were consolidated for trial. The Commonwealth's first witness was Kentucky State Police Detective John Carr. Carr was asked by the prosecution if he had taken or attempted to take a statement from either of the defendants. Objections were made based upon a defendant's right to remain silent. However, Carr, according to Appellant, "almost simultaneously," answered that he attempted to obtain statements from the defendants but that

they had declined to say anything.

A short bench conference ensued, followed by an adjournment for a longer conference in the court's chambers. According to Appellant, while the prosecutor asserted that his question had not been deliberate, the trial judge noted that the inquiry had so sounded. Appellant states that the defendants' motion for a mistrial was subsequently granted by the trial court, which then explained to the jury that the prosection's question, and the response by Carr, were inappropriate.

When the trial court advised that the case could be set for a second trial, Appellant sought a writ of prohibition from the Court of Appeals, which denied such relief in a two-to-one decision, with Judge Miller dissenting without opinion. The Court of Appeals cited to its recent decision of Anderson v. Commonwealth, Ky.App., 902 S.W.2d 269 (1995), and

concluded "that the circuit court did not make any finding that there was bad faith on the part of the prosecution...."

Appellant argues that retrial of this matter would violate his state and federal guarantees against double jeopardy. While Appellant concedes that Anderson, supra, requires a finding of bad faith, overreaching or some other fundamentally unfair action on the part of the prosecution before retrial is barred on double jeopardy grounds, he argues that nowhere in either the Kentucky or United States Constitutions is such a finding requires. Appellant seeks a review of this standard, asserting that the occurrence of a mistrial, for any reason, simply puts an end to the criminal judicial matter.

In this request for relief, Appellant cites less to case law and relies mostly upon an inherent, intangible sense of rightness.1 For instance, Appellant argues

that the "get tough on crime" attitude prevalent in today's society, along with the intense media coverage of criminal proceedings and the increased use of tax dollars to fund roads and economic development - with the result that the court system and its overloaded docket is left underfunded - has resulted in a judicial erosion of the constitutional guarantee not to be twice placed in jeopardy for the same crime. To this end, Appellant relies upon Chief Justice Stephens' dissent in West v. Commonwealth, Ky., 780 S.W.2d 600,

---

1. "You Justices of the Supreme Court see many of these cases and I cannot teach you a thing or quote you any dazzling case law you have not thought of yourself or seen from other lawyers . . . Certainly the mountain looks high and steep in the face of Anderson v. Commonwealth, but looks can be deceiving. Ervin Jenkins deserves what he has asked for . . . if you apply the Constitution strongly for the protection of Ervin Jenkins, you will have performed a might deed and will have struck a strong blow for justice . . . ." Petitioner's Brief at 11-12.

604 (1989), which concluded, in a case involving allegations of prosecutorial misconduct, that, based upon "the inappropriate, inflammatory, prejudicial, unnecessary, intemperate, vilifying and deceptive statements of the prosecutor . . . [j]ustice and the reputation of our criminal justice system demand [reversal]." Appellant also makes much of the fact that no response was filed to his request for a writ of prohibition, which Appellant interprets as a sign of indifference on the part of the Commonwealth, and a recognition that there are cases stronger than Appellant's for the prosecution to pursue. Appellant assures that no crime wave will follow if the requested relief herein is granted.

Appellant's abstract arguments aside, in Kentucky "the general rule [is] that a party who moves for a mistrial may not thereafter invoke the bar of double

jeopardy to prevent retrial . . . ." Tinsley v. Jackson, Ky., 771 S.W. 2d 331, 332 (1989). Moreover, "[a] party seeking to prevent his retrial upon double jeopardy grounds must show that the conduct giving rise to the order of mistrial was precipitated by bad faith, overreaching or some other fundamentally unfair action of the prosecutor or the court." Id.; see also Silverburg v. Commonwealth, Ky., 587 S.W.2d 241, 242 (1979) (quoting Commonwealth v. Lewis, Ky., 548 S.W.2d 509, 510, (1977) ("Broadly speaking, if there is no bad faith and the choice has not been forced upon the defendant, he is not in a position to cry double jeopardy when the trial is relaunched.").

In a case factually similar to the instant matter, this court stated:

> We do not by this opinion lay down a flat rule that where a defendant in a criminal trial successfully moves for a mistrial, he may not thereafter

> invoke the bar of double jeopardy against a second trial. But we do hold that the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.

Stamps v. Commonwealth, Ky, 648 S.W.2d 868, 869 (1983) (quoting Oregon v. Kennedy, 456 U.S. 667, 679, 102 S.Ct. 2083, 2091, 72 L.Ed.2d 416, 427 (1982)).

In Stamps, the prosecution, on cross-examination, asked a police officer if the appellant had made any statement at the time of his surrender. Before the officer could respond, defense counsel objected. The trial court sustained this objection and granted defense's motion for a mistrial. Appellant was convicted after a subsequent trial, and the issue on appeal was whether the trial court had erred in denying a motion to dismiss on double

jeopardy grounds. We affirmed the judgment based upon a finding that "[t]he trial judge [had] been present at both trials and [had] determined that intentional provocation was absent . . . ." Id. Likewise, in Tinsley, supra at 332, this Court relied upon the trial court's determination of whether or not prosecutorial misconduct had been present in order to prevent retrial and concluded that "[t]his Court is unable to say that the trial court's factual determinations were clearly erroneous or constituted an abuse of discretion." See also Gray v. Goodenough, Ky., 750 S.W.2d 428, 429 (1988) ("When a mistrial has been granted, a retrial does not expose a defendant to double jeopardy unless the trial judge abused his discretion by declaring a mistrial when there was no manifest necessity to do so."); Macklin v. Commonwealth, Ky.App., 687 S.W.2d 540, 541

(1985) ("The trial judge was present at the proceedings below and made specific findings that the Commonwealth acted in good faith and that intentional provocation was absent.").

We can also not say that, in this matter, there was any such error or abuse of discretion on the part of the trial court. Moreover, as Appellant has not advanced any compelling reasons why this Court should now abandon the above-standard in evaluating the constitutionality of a retrial after a prior declaration of a mistrial, his arguments herein must fail.

For the foregoing reasons, the order of the Court of Appeals is affirmed.

All concur.

COUNSEL FOR APPELLANT:

Thomas E. Cooper
215 North Mulberry Street
Elizabethtown, KY 42701

COUNSEL FOR APPELLEE:

William S. Cooper, Judge

Hardin Circuit Court
Division I, Courthouse
Public Square
Elizabethtown, KY 42702-0127

APPENDIX B

ORDER OF THE KENTUCKY SUPREME COURT ENTERED MARCH 27, 1997 DENYING PETITION FOR REHEARING

SUPREME COURT OF KENTUCKY
96-SC-235-MR

ERVIN THOMAS JENKINS, JR APPELLANT

ORIGINAL ACTION FROM COURT OF APPEALS
V. 95-CA-3479-OA
HARDIN CIRCUIT COURT
95-CR-18

WILLIAM S. COOPER, JUDGE APPELLEE
HARDIN CIRCUIT COURT

AND

JEFFREY L. ENGLAND,
COMMONWEALTH ATTORNEY
REAL PARTY IN INTEREST

AND

BARBARA JENKINS REAL PARTY IN INTEREST

ORDER DENYING PETITION FOR REHEARING

The Petition for rehearing filed by Appellant, Ervin Thomas Jenkins, Jr., is hereby denied.

All concur. Cooper, J., not sitting.

Entered: March 27, 1997.

CHIEF JUSTICE

APPENDIX C

ORDER OF THE KENTUCKY COURT OF APPEALS ENTERED FEBRUARY 14, 1996 DENYING PETITION FOR WRIT OF PROHIBITION

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 95-CA-3479-OA

ERVIN THOMAS JENKINS, JR. PETITIONER

V. ORIGINAL ACTION
REGARDING HARDIN CIRCUIT COURT

WILLIAM S. COOPER, JUDGE
HARDIN CIRCUIT COURT RESPONDENT

AND

BARBARA JENKINS
COMMONWEALTH ATTORNEY
REAL PARTIES IN INTEREST

* * * * * * * * *

ORDER

BEFORE: GARDNER, JOHNSON AND MILLER, JUDGES.

The petitioner seeks a writ of prohibition to prevent being tried a second time after a mistrial was granted by the circuit judge. The Court having considered this matter has determined that the circuit court did not make any finding that there was bad faith on the part of the prosecution and therefore according to Anderson v. commonwealth, Ky. 902 S.W.2d

269 (1995), the Court ORDERS that this writ prohibition be, and it is hereby, DENIED.

MILLER, JUDGE DISSENTS, and would grant the petition for writ of prohibition.

ENTERED: Feb 14 1996

JUDGE, COURT OF APPEALS

APPENDIX D

ORDER OF HARDIN CIRCUIT COURT
ENTERED SEPTEMBER 11, 1995
GRANTING PETITIONER'S MOTION FOR MISTRIAL

HARDIN CIRCUIT COURT

NO 95-CR-00018 DIVISION I

COMMONWEALTH OF KENTUCKY, PLAINTIFF

VS.

IRVIN THOMAS JENKINS, JR. DEFENDANT,

NO. 95-CR-00035

COMMONWEALTH OF KENTUCKY, PLAINTIFF

VS. ORDER

BARBARA A. JENKINS DEFENDANT,

* * *

This action came before the court for trial by jury as scheduled on September 11, 1995. During the testimony of the Commonwealth's first witness, the defendants jointly moved for a mistrial on grounds that the witness had commented on the defendants' exercise of their constitutional right to remain silent. The motion for a mistrial having been granted,

IT IS HEREBY ORDERED as follows:

1. That the swearing of the jury is

set aside;

2. That this action may be rescheduled for trial upon motion of the Commonwealth or the defendants.

This 11 day of September, 1995.

JUDGE, HARDIN CIRCUIT
COURT DIVISION I

ENTERED 9-11-95
ATTEST: RALPH BASKETT
CLERK HARDIN CIRCUIT
COURT

BY _____ D.C.

APPENDIX E

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF HARDIN CIRCUIT COURT ENTERED DECEMBER 28, 1995

HARDIN CIRCUIT COURT

NO 95-CR-00018 DIVISION I

COMMONWEALTH OF KENTUCKY, PLAINTIFF

VS.

IRVIN THOMAS JENKINS, JR. DEFENDANT,

NO. 95-CR-00035

COMMONWEALTH OF KENTUCKY, PLAINTIFF

VS.

FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER

BARBARA A. JENKINS DEFENDANT,

* * *

FINDINGS OF FACT

This action came before the court for trial by jury as scheduled on September 11, 1995. The Commonwealth's first witness was Kentucky State Police Detective John Carr. Shortly after the witness was sworn, he was asked if, during his investigation, he attempted to obtain statements from the defendants. He replied that he requested statements from the defendants, but that

they declined. Both defendants objected and moved for a mistrial, which was granted. They now move to dismiss the indictments on grounds that to retry them would violate their constitutional rights against double jeopardy.

The purpose of the prosecutor's question was not to elicit a comment on the defendants' rights to remain silent. The prosecutor knew Carr had not interviewed the defendants, but that they had been interviewed by employees of the Cabinet for Human Resources. Thus, he expected the answer to be "No." Carr was not expecting the question and his answer was truthful. His comment on the defendants' rights to remain silent was inadvertent. Thus, the statement resulting in the mistrial was not precipitated by bad faith, overreaching or any fundamentally unfair action of the prosecutor or the court.

CONCLUSIONS OF LAW

Generally, a party seeking a mistrial may not prevent his retrial on the same charge. Anderson v. Commonwealth, Ky. App., 902 S.W.2d 269 (1995). The only exception is when the conduct giving rise to the order of mistrial was precipitated by bad faith, overreaching or some other fundamentally unfair action of the prosecutor or the court. Id.; Tinsley v. Jackson, Ky., 771 S.W.2d 331 (1989). Since that did not occur in this case, the motions of the defendants to dismiss these indictments on double jeopardy grounds must be overruled.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the motions of the defendants to dismiss the indictments on double jeopardy grounds are OVERRULED.

This 28 day of December, 1995

JUDGE, HARDIN CIRCUIT COURT DIVISION I

ENTERED 12-28-95
ATTEST: RALPH BASKETT, CLERK HARDIN CIRCUIT COURT
BY_____D.C.

APPENDIX F

ORDER OF HARDIN CIRCUIT COURT
ENTERED OCTOBER 17, 1995
SETTING DATE FOR RETRIAL OF PETITIONER

HARDIN CIRCUIT COURT
DIVISION I
INDICTMENT NO. 95 CR 00018
AND 95 CR 00035

COMMONWEALTH OF KENTUCKY PLAINTIFF

V. O R D E R

IRVIN THOMAS JENKINS, JR.
BARBARA JENKINS DEFENDANT

** ** ** **

On the motion of the Commonwealth and the Court being duly advised;

IT IS HEREBY ORDERED that this matter be and it is hereby set for trial by jury on the 11th day of January, 1996, at 9:00 a.m.

SO ORDERED this 17 day of October, 1995.

JUDGE, HARDIN CIRCUIT
COURT DIVISION I

TENDERED BY:

COMMONWEALTH'S ATTORNEY'S OFFICE

ENTERED 10-18-95
ATTEST: RALPH BASKETT

CLERK HARDIN CIRCUIT COURT

BY_____D.C.